Neutral Citation Number: [2022] UKIP Trib 3

Case No: IPT/19/04/C and others

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 1 November 2022

Before :
LORD JUSTICE SINGH
(PRESIDENT)
LADY CARMICHAEL
and
MR JUSTICE CHAMBERLAIN

Between:
VARIOUS **Claimants**

(1) SECURITY SERVICE **Respondents**
(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS

E appeared in person
Adam Heppinstall KC and **William Hays** (instructed by the **Treasury Solicitor**) for the Respondents
Julian Milford KC as Counsel to the Tribunal

Hearing dates: 13-14 July 2022

OPEN JUDGMENT

This judgment was handed down remotely at 10 a.m. on 1 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Judgment Approved by the Tribunal for handing down.

Lord Justice Singh :

Introduction

1. This is the OPEN judgment of the Tribunal. There is also a CLOSED judgment.

2. A number of individual complaints and claims have been brought before this Tribunal in relation to vetting issues. The Respondents are either the Security Service (MI5) or the Government Communications Headquarters ("GCHQ"). A sample of four test cases was selected in order to consider certain preliminary issues which are common to all of them:

   (1) The Tribunal's jurisdiction in relation to vetting complaints, including what its jurisdiction is over complaints of discrimination concerning vetting.

   (2) Whether Article 6 of the European Convention on Human Rights ("ECHR") applies to vetting complaints.

   (3) Whether there are any other principles of procedural fairness which apply to vetting decisions, including whether there is any duty to give reasons for a refusal to grant vetting approval (subject to any considerations of national security).

3. It is hoped that, in giving judgment on those issues of principle, this Tribunal can give guidance which will be of assistance not only in the four sample cases but in vetting cases generally.

4. The four individual cases which were selected for this purpose are the following:

   (1) *E v Security Service* IPT/19/04/C

   (2) *O v GCHQ* IPT/18/71/C

   (3) *S v GCHQ* IPT/19/85/C

   (4) *VDB v GCHQ* IPT/18/121/C.

5. We have been assisted by legal submissions by Counsel to the Tribunal (Julian Milford KC) ("CTT") and Counsel for the Respondents (Adam Heppinstall KC and William Hays). We have also received written submissions from Mr VDB and Mr E. In addition Mr E made concise and helpful oral submissions at the hearing before us. We are grateful to them all.

6. In this judgment we will deal only with generic issues of principle. We will refer to the facts of individual cases only insofar as they help to understand those generic issues. The Tribunal will then later, and separately, consider the application of those principles to the facts of individual cases.

E v Security Service

7. The Claimant in IPT/19/04/C was at the relevant time a government contractor working as an Investigator at a prosecution agency. He held Security Clearance ("SC"). In June 2018, he applied for a position at M15. In October 2018, he was made an offer of employment, conditional on receiving Developed Vetting ("DV") clearance. On 6 December 2018 he attended a vetting interview with a Vetting Officer from M15. He provided further information by telephone and email on 11 December 2018. On 11 January 2019 he received an email from M15's recruitment team, attaching a letter stating that his application would not proceed as a decision had been made not to proceed with his DV clearance. The letter stated that no reasons could be given for this, where necessary for national security. Following further enquiries, M15 sent Mr E a further email on 16 January 2019, stating that the refusal was not related to his potential to conduct the job for which he had applied, but was a refusal on vetting grounds only. It stated that there could be no further discussion about the reasons behind the decision. Mr E complains about the following matters:

   (l) The fact that he was given no reasons for the refusal of DV clearance, nor an indication or summary of the reasons.

   (2) The fact that DV clearance was refused without considering further information he sought to provide, and without contacting his referees.

   (3) The fact that his DV clearance was refused without giving him an opportunity to respond to any concerns the Vetting Officer or Vetting Assessor might have had.

O v GCHQ

8. The Claimant in IPT/18/71/C, an employee of a third party, held SC with GCHQ from 2009. She received clearance, although at that time she had unsecured debt of £14,705. In November 2009, she was put on a Debt Management Plan. Her SC clearance was renewed in 2014. At that time, she had unsecured debt of £9,671. In 2017 she applied again. She was refused SC, although at that time (or shortly thereafter) her level of unsecured debt had reduced to £5,820. In 2017 her husband had moved to more lucrative employment. In February 2018 she received a letter from Personnel Security at GCHQ advising that the recommendation would be made for her SC clearance to be withdrawn due to "Financial Matters —poor financial decision making". She was told that she had the opportunity to respond in writing, which she did, and was told that an SC review panel would be convened to consider the recommendation. The panel upheld the recommendation.

S v GCHO

9. At the material time, the Claimant in IPT/19/85/C had worked for many years for a third party, holding SC clearance granted by a different agency. He required DV clearance from GCHQ, which was refused in June 2019. Mr S's complaint suggests that he was told he could no longer work with the same customers, on the basis that his

SC clearance would be removed following refusal of DV clearance. Mr S was not given any reasons for the refusal to grant him DV clearance. Mr S alleges that the process showed bias, because he lived in Northern Ireland.

VDB v GCHQ

10. The Claimant in IPT/18/121/C has dual British/South African nationality. He was offered a "Cyber First Bursary" by GCHQ on 25 October 2017. He completed an application for SC clearance on 13 November 2017. On 6 February 2018 he was told that he did not meet the eligibility criteria for the scheme. He complained to the Head of Vetting, who told him it was not possible to disclose the reasons why his SC clearance had been refused. The refusal stated:

> "Please note that refusal on one occasion does not necessarily mean that clearance might not be granted on a future occasion. Changes in your circumstances may very well lead to a different outcome. After an interval of about 3 years we would be prepared to consider another application from you."

11. Mr VDB contends that the refusal was on grounds of his nationality.

Material legislation

12. The Investigatory Powers Tribunal ("the Tribunal" or "the IPT") was created by the Regulation of Investigatory Powers Act 2000 ("RIPA"). Its jurisdiction is a statutory one and is conferred by section 65 of RIPA. In broad terms there are two types of case which can be brought before the Tribunal. The first is a claim brought under section 7 of the Human Rights Act 1998 ("HRA"). In the case of such a claim, the Tribunal is "the only appropriate tribunal" for proceedings which fall within section 65(3) of RIPA, in particular proceedings against any of the intelligence services, as defined in section 81: see subsection (3)(a). The intelligence services include MI5 and GCHQ.

13. The second type of case is any complaint made which, in accordance with section 65(4) of RIPA, is a complaint for which the Tribunal is "the appropriate forum". Subsection (4) provides that the Tribunal is the appropriate forum for any complaint by a person who is aggrieved by any conduct falling within subsection (5) which he believes (a) to have taken place in relation to him [etc.]; and (b) to have taken place in challengeable circumstances or to have been carried out by or on behalf of any of the intelligence services. Conduct which falls within subsection (5) includes (a) conduct by or on behalf of any of the intelligence services. It is unnecessary for present purposes to delve into what constitutes "challengeable circumstances", by reference to subsections (7) and (8), because it is common ground that, in the present context, there is conduct by or on behalf of any of the intelligence services, that is the carrying out of a vetting exercise.

14. Section 67 of RIPA provides, in subsection (2), that where the Tribunal hear any proceedings by virtue of section 65(2)(a), they shall apply the same principles for making their determination in those proceedings as would be applied by a court on an

application for judicial review. Where the Tribunal consider a complaint under section 65(2)(b), it shall be the duty of the Tribunal to determine the complaint by applying the same principles as would be applied by a court on an application for judicial review: see section 67(3)(c).

15. Section 67(7) sets out the various remedies which the Tribunal has power to grant. Although examples are given of various specific types of order which may be made, the power is a broad one: the Tribunal "shall have power to make any such award of compensation or other order as they think fit".

The Security Vetting Appeals Panel

16. Both CTT and counsel for the Respondents have drawn our attention to the Security Vetting Appeals Panel ("SVAP"). This is a non-statutory body, which is governed by Government policy: see *HMG Personnel Security Controls*, version 5.0, (January 2022) in particular paras. 48-51. The SVAP is an independent advisory body which provides a means of challenging a decision to refuse or withdraw a national security vetting clearance once an internal appeal has been dismissed. It sits in a panel of three, chaired by a senior retired member of the judiciary. The SVAP has an advisory role only; it does not consider cases brought by applicants for employment; and it cannot award compensation. Importantly in the present context, the SVAP does not consider cases relating to the intelligence services. Those are expressly reserved to the jurisdiction of this Tribunal.

17. The Respondents acknowledge that there may be a degree of concurrent jurisdiction where the SVAP appellant is a civil servant but it is submitted that the SVAP should deal with such cases, as the decision whether to grant or refuse clearance is always one for the employing department and not for those who were consulted by it. There might be a situation where concurrent proceedings are on foot before both the SVAP and this Tribunal and, in that situation, it is suggested that this Tribunal might choose to stay the complaint to see if the SVAP appeal resolves all issues.

Government policy on vetting

18. Government policy on vetting is set out principally in *HMG Personnel Security Controls*, issued by the Cabinet Office. The current version (Version 5.0) was issued in January 2022 but it has not been suggested that there has been any material change since the events in the four test cases. It should be noted, however, as Mr Heppinstall reminded us, that the policy is of general application: it applies, for example, to civil service appointments. Not all vetting checks are carried out by the intelligence services. Where they are carried out by the intelligence services, and in particular where an appointment is to be made to one of those services, Mr Heppinstall submits that special considerations of national security may apply, which do not necessarily apply to other kinds of appointment or other kinds of vetting checks.

19. Paras. 1-4 of the policy set out the purpose of Personnel Security and National Security Vetting. To protect national security the Government must have in place a range of

protective security measures. Government employees (and temporary staff and contractors) potentially have access to a range of sensitive "assets" (personnel, physical or information) and may be at risk from a wide range of threats, including terrorism and espionage. Whilst personnel security checks cannot provide guarantees, they are sensible precautions. They provide for checks to be made that can indicate whether individuals may be susceptible to influence or pressure which may cause them to abuse their position and whether there are any other reasons why they should not have access to sensitive assets or sites.

20. Para. 24 deals specifically with the topic of residency. This makes it clear that lack of UK residency is not necessarily a bar to security clearance but that decision makers will need to consider what checks can be carried out and the information available on which to make a decision. Individuals will need to have lived in the UK for a sufficient period of time to enable appropriate checks to be carried out and provide a result which provides the required level of assurance. Depending on the level of clearance, this will usually range from three to 10 years.

21. Annex A to the policy sets out a Statement of HMG Personnel Security and National Security Vetting Policy. Para. 1 explains that it is HM Government's policy that all areas of government and the national infrastructure should include in their recruitment processes certain basic checks. These are 'Minimum Personnel Security Controls'. National security vetting is explained at paras. 2-4. Para. 4 outlines the four different types of national security vetting clearance: Accreditation Check ("AC"), Counter Terrorist Check ("CTC"), Security Check ("SC") and Developed Vetting ("DV").

22. Para. 8 states that national security vetting decisions may only be taken by Government departments, agencies, the armed forces, police forces or relevant vetting authorities. All the available information is taken into account to reach a reasoned decision on an individual's suitability to hold a security clearance.

23. Para. 10 states that:

> "Wherever possible existing employees will have an opportunity to discuss, comment on and challenge any adverse information that arises. However, in certain circumstances it may not be possible to share such information as this could compromise national security, the public interest or third-party confidentiality."

24. Avenues of appeal are set out at paras. 11-13. For existing employees, all departments and agencies that carry out national security vetting must provide for an internal appeal process. Where individuals remain dissatisfied they may appeal to the SVAP. Para. 13 explains that there are no appeal routes available for applicants for employment who are refused a security clearance. Separate arrangements exist for applicants to, and employees and contractors of, the security and intelligence agencies, who may complain to the IPT. In addition, it is pointed out that any individual may apply to an Employment Tribunal ("ET") if they feel that they have been discriminated against in any part of the recruitment process.

25. Annex B to the policy, headed 'HMG Personnel Security Controls', sets out in tabular form the various types of check that may be required for anyone with access to "government assets", including civil servants, members of the armed forces and government contractors. The first type is the Baseline Personnel Security Standard (BPSS). Another type, an Accreditation Check (AC), may be required of certain individuals who may require unescorted access to the security restricted area of UK airports. The third type is a Counter Terrorist Check (CTC). The fourth type is a Security Check (SC): this will be required in particular of individuals who will have long-term, frequent and uncontrolled access to SECRET assets and/or occasional, supervised access to TOP SECRET assets. Although there will be, for example, a check of Security Service records, it will be exceptional for there to be an interview. The fifth and most stringent type of check is Developed Vetting (DV), for individuals who will, for example, have frequent and uncontrolled access to TOP SECRET assets. This process will include a detailed interview by a fully trained Investigating Officer.

26. It will be apparent from this outline that a person may already be employed in government service and may already have clearance at, for example, SC level but may be refused clearance at DV level.

27. Mr Heppinstall pointed out that, in such circumstances, there may well be an existing, indeed continuing, relationship between the individual concerned and a government department. That relationship may well therefore give rise to a duty of care. There may be an implied term of mutual trust and confidence if there is an employment relationship. These features will be absent if, for example, an individual is an applicant for a post and is refused it on security grounds after a vetting process conducted by the intelligence services. This is one reason, submits Mr Heppinstall, why the law does not, and should not, impose the same, uniform requirements in all the various categories of case that can arise.

28. Annex C to the policy sets out Frequently Asked Questions and the answers to them. These include what will be asked at interview. It is said that the interview will be wide-ranging and cover most aspects of the subject's life. The aim is to obtain a rounded picture of that person as an individual to determine whether they will be able to cope with access to sensitive material at the highest levels. The guidance goes on to say that:

> "You should expect to be asked about your family background, past experiences, health, sex life, drinking habits, experience (if any) of drug taking, financial affairs, general political views (though not what party you support), hobbies, foreign travel and connections. All these questions are asked for a purpose and you must be as frank as possible."

29. Guidance to Vetting Officers and others is given in another document: the *Vetting Decision Framework* (Version 2.0 April 2017). As para. 2 states, the purpose of this Framework is to provide guidance for assessing the relevance, importance and impact of information obtained in the vetting process, in the context of making fair, consistent and well-founded decisions. A redacted version of this document is in the OPEN bundle for the hearing before us.

The Tribunal's jurisdiction

30. CTT submits, in outline, that the Tribunal has jurisdiction over vetting complaints against the security and intelligence services, either under section 65(2)(a) of RIPA, where there is a claim that there has been conduct which is incompatible with the Convention rights, or where there is a complaint made under section 65(2)(b). The former jurisdiction is an exclusive one, whereas the latter jurisdiction is not. CTT submits that the jurisdiction includes discrimination complaints made under Article 14 of the European Convention on Human Rights ("ECHR"), read with Article 8. However, it is common ground that the Tribunal does not have jurisdiction over discrimination complaints brought under the Equality Act 2010 ("the Equality Act") (or indeed other statutory employment rights, for example unfair dismissal).

31. The Respondents accept that the Tribunal has exclusive jurisdiction over all claims against any of the intelligence services brought under section 7(1)(a) of the HRA: see the decision of the Supreme Court in *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12; [2010] 2 AC 1.

32. The Respondents also agree with CTT that the Tribunal does not have jurisdiction over statutory employment rights, for example unfair dismissal and work-related discrimination claims under the Equality Act. Only the ET has jurisdiction over such claims. It is noted that the procedures of the ET are capable of accommodating cases which raise national security issues, for example by holding a CLOSED hearing and appointing a special advocate to represent the interests of the excluded claimant. Those procedures were considered by the Supreme Court and held to be compatible with Article 6 of the ECHR in *Tariq v Home Office* [2011] UKSC 35; [2012] 1 AC 452. The unsuccessful appellant in that case later made an application to the European Court of Human Rights, which was held to be inadmissible on the ground that it was manifestly ill-founded.

33. So far as the Equality Act is concerned, sections 39 to 41 (which are in Part 5 of the Act, which relates to work) prohibit discrimination in relation to the recruitment of employees, during employment and on dismissal. The Act generally binds the Crown: see section 205. Part 5 of the Act applies to all those in Crown employment as defined by section 191 of the Employment Rights Act 1996 ("ERA"). Crown employment means employment under or for the purposes of a Government department or any office or body exercising functions on behalf of the Crown which are conferred by a statutory provision. However, the jurisdiction to enforce Part 5 is exclusively vested in the ET by section 120(1) of the Equality Act.

34. In summary, the Respondents submit that this Tribunal's jurisdiction is wide enough to encompass any vetting-related complaint, whether one brought by:

    (l) a current or former intelligence services employee;

    (2) an applicant for such employment;

    (3) a prospective or current independent contractor to the intelligence services; or

    (4) an employee (or applicant for employment) or contractor or a prospective contractor, of another employer (whether within the civil service, the police, the military or

within the private sector) who complains about an intelligence service's role in vetting processes relating to that employment or contract.

35. However, and importantly, it is common ground that this Tribunal's jurisdiction is circumscribed by the exclusive jurisdiction of the ET over claims for unfair dismissal and work-related claims under the Equality Act.

36. We accept and endorse the submission made by both Mr Heppinstall and CTT that this Tribunal has no jurisdiction to consider a complaint that an individual has been unfairly dismissed: exclusive jurisdiction to consider unfair dismissal claims is vested in the ET by section 111(1) of the ERA.

37. In that context we note the provisions of section 10(1) of the Employment Tribunals Act 1996 ("ETA"). If, on a complaint under (among other provisions) section 111 of the ERA, it is shown that the action complained of was taken for the purpose of safeguarding national security, the ET shall dismiss the complaint.

38. Nevertheless, it is also important to note that section 10(1) of the ETA was interpreted by the Employment Appeal Tribunal ("EAT") in such a way that, even where an employer is faced with that national security purpose by a third party, it is still necessary for the ET to conclude that the employer acted reasonably in dismissing: see *B v BAA plc* [2005] ICR 1530, at paras. 38-39 (Burton J, President). This is because the decision to dismiss (rather than redeploy) an employee must still fall within the range of reasonable responses open to an employer faced with the view of a third party as to the requirements of national security (in the present context that would be an intelligence service that has refused a vetting clearance).

39. It appeared to be common ground between Mr Heppinstall and CTT that what the ET does not have jurisdiction to do is assess the correctness or even the reasonableness of the view of the third party (the intelligence service) not to grant security clearance. It follows that, in cases where a person is already an employee and is dismissed, the only forum which could consider the lawfulness of the vetting decision of the intelligence service is this Tribunal.

40. We also endorse the jointly held position of the Respondents and CTT that the ET has exclusive jurisdiction over a complaint of unlawful discrimination under the Equality Act in a work-related context. This follows from the provisions of section 120(1) of the Equality Act, which confers jurisdiction on the ET to determine a complaint relating to a contravention of Part 5 of that Act, which relates to work. Section 113(1) of the Equality Act provides that proceedings relating to a contravention of that Act must be brought in accordance with "this Part", which includes section 120. While section 113(3)(a) makes it clear that subsection (l) does not prevent a "claim for judicial review", we agree with CTT that a claim or complaint made to this Tribunal under section 65(2)(a) or (b) of RIPA is not a claim for judicial review. In this context, that phrase is a term of art and refers to a claim brought in the High Court in accordance with CPR Part 54: see *Hamnett v Essex County Council* [2014] EWHC 246 (Admin); [2014] 1 WLR 2562, at para. 58 (Singh J); approved by the Court of Appeal at [2017] EWCA Civ 6; [2017] 1 WLR 1155, at para. 24(vi) (Gross LJ).

41. Accordingly, a person who wishes to complain that they have been unlawfully discriminated against on the ground of a protected characteristic, such as nationality

(and that ground is not always unlawful, since it may sometimes be permissible in the context of Crown employment), must do so in the ET and not in this Tribunal. This will be of particular relevance to an applicant for employment, since the right not to be unfairly dismissed is not available to them. As was common ground before us, the ET has procedures available to it to deal with cases within its jurisdiction which arise in the context of national security, for example it can hold a CLOSED hearing and hear from a special advocate to represent the interests of a claimant. Such procedures were considered by the Supreme Court in *Tariq* and by the European Court of Human Rights when that case subsequently came before that Court. Those procedures were held to be compatible with Article 6 of the ECHR.

42. We also note in this context the 2019 Tailored Review of the SVAP, issued by the Cabinet Office. Annex 3 to that document is headed 'The "overlap" between the roles of SVAP and the Employment Tribunal'. The Annex noted that the Chair and Secretary of the SVAP had met Langstaff J (President of the EAT) and Judge Doyle (President of the ET) on 23 November 2015 to clarify their respective roles. Although no formal arrangement had been put in place, they agreed that it would be sensible for ET cases brought by individuals on the basis of a refusal or withdrawal of national security vetting clearance to be routinely heard in the SVAP in the first instance, and for the Panel's recommendations to be taken into account by the subsequent ET in deciding whether a department had acted reasonably or proportionately.

43. Similarly, in our view, if an individual wishes to complain about the security clearance issue in circumstances that fall outside the remit of SVAP, for example if the employee works for an intelligence service, it would make sense for that to be considered by this Tribunal before any proceedings are considered by the ET.

Application of Article 6 of the ECHR

44. At one time there was considerable uncertainty in the Strasbourg case law as to whether, and when, Article 6(1) of the ECHR applies to public sector employment disputes. This is because the concept of the "determination" of "civil rights" in Article 6(1) is not entirely familiar to common lawyers, based as it is on a civilian distinction between private law and public law. Nevertheless, we need not take time over this since it is common ground that, in the light of the way that the case law has developed, there will be cases involving employment where there has been a refusal or withdrawal of security clearance which fall within Article 6(1): see in particular the judgment of the Grand Chamber in *Regner v Czech Republic* (2018) 66 EHRR 9 and of the Court in *Gulamhussein v UK* (2018) 67 EHRR SE2. In *Regner* the Court found there to be no violation of Article 6(1) even though the applicant and his lawyer did not have access to the classified documents that were critical to the decision on security clearance in that case. Nor, as Mr Heppinstall pointed out to us, was there a special advocate procedure or anything like it such as the CTT procedure that is used in this Tribunal. Nevertheless, the Court concluded that the essence of the right to a fair trial had not been impaired because there was access to an independent judicial body that was able to consider the relevant documents: see paras. 150-162 of the judgment.

45. In *Gulamhussein* of particular relevance are paras. 76-98, in particular para. 87, where it was noted that the restrictions on the proceedings in *Tariq* were fewer than those in

Regner. In the result the Court found both applications in *Gulamhussein* and *Tariq* to be inadmissible because they were manifestly ill-founded.

46. It would not matter in this context that the court does not necessarily have a full merits jurisdiction since it is well established that Article 6 does not always require that, for example when a court is exercising a judicial review function. That is so in the present context, where this Tribunal is expressly required to apply the principles that would be applied on an application for judicial review.

47. Moreover, it is well established that, in the context of national security, great respect must be paid to the assessment of the responsible authorities. It is not the function of a court or tribunal to substitute its own opinion of national security matters for that of the intelligence services, both on grounds of institutional capacity and democratic accountability: see e.g. *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765, at para. 70 (Lord Reed PSC). That limitation on the Tribunal's role does not mean that there is a breach of Article 6 since what is critical is that there is access to an independent judicial body which can consider all the underlying documents and can subject the assessment of the intelligence services to judicial review.

48. In similar vein, in *R (Secretary of State for Foreign and Commonwealth Affairs) v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin); [2014] Inquest LR 258, at para. 57, Goldring LJ said that, when carrying out the balancing exercise of weighing national security against the proper administration of justice,

> "the Secretary of State's view regarding the nature and extent of damage to national security which will flow from disclosure should be accepted unless there are cogent and solid reasons to reject it."

This was cited with approval by Lord Dyson MR in *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6; [2016] 1 WLR 1505, at para. 80.

49. That is not to say that the courts or this Tribunal must simply accept the view of the UKIC without question. Judges have a duty, even in the context of national security, to examine the executive's decisions and actions in accordance with the ordinary tests of rationality, legality, procedural regularity and, where Convention rights are affected, proportionality: see *R (Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546, at para. 48 (Carnwath LJ). Nevertheless, as Carnwath LJ went on to say in that passage, "great weight" will be given to the assessment of the relevant minister (in the present context the UKIC).

50. The Respondents draw a distinction between the position of existing employees and others who apply for employment. They accept that, where the connection between the loss of clearance and the loss of employment/loss of duties is more than tenuous or remote, Article 6 of the ECHR will apply to any dispute about loss of vetting/clearance. Where there is no such connection to loss of employment or duties, they submit Article 6 will not apply. This test is derived from the decision of the Grand Chamber of the European Court of Human Rights in *Regner v Czech Republic,* in particular at para. 119, which was followed in *Gulamhussein v UK*, at para. 67. *Gulamhussein* was a case concerning the vetting process in the UK. One of the applicants in that case was Mr Tariq, whose appeal to the Supreme Court had been dismissed (see above). Finally, the

Respondents accept that common law procedural fairness and equality law may have wider application to applicants for employment.

51. The Respondents also emphasise the decision of the Supreme Court in *Tariq v Home Office*, which was considered by the European Court in *Gulamhussein.* They emphasise that in each of these cases it has been held that Article 6 does not confer an absolute right on the part of the individual affected to have access to all the relevant information and documents. They emphasise that the test is whether the domestic courts have the necessary independence and impartiality, have unlimited access to all the classified documents which justified the decision and are empowered to assess the merits of the decision revoking security clearance and to quash, where applicable, such a decision if it is arbitrary. They also emphasise that, in *Regner*, the Czech courts did not undertake a process which included a special advocate, as may occur in this country. In the context of the IPT, although the role of CTT is not identical to that of a special advocate, nevertheless one of the functions which he can perform in order to assist the Tribunal is to make representations on behalf of the claimant when he is excluded from CLOSED proceedings or from seeing CLOSED material.

52. The Respondents also draw our attention to the decision of the Court of Appeal in *Kiani v Secretary of State* for the Home Department [2015] EWCA Civ 776; [2016] QB 595, in particular at paras. 23, 158 and 159. Lord Dyson MR said there that, in surveillance and security vetting cases, an individual is not entitled to full Article 6 rights if to accord him such rights would jeopardise the efficacy of the surveillance or security vetting regime itself. In particular, there is no right to be given the gist of relevant information if and to the extent that this would jeopardise the efficacy of the surveillance or security vetting regime.

53. In his submissions CTT accepts that whether to grant or refuse vetting clearance is a decision of a public law character, which does not itself involve the determination of a civil right. However, it may well have a decisive impact upon existing employment. Accordingly, a dispute over a vetting decision will engage Article 6 where it concerns an employee who requires vetting clearance to carry out their existing job. It would also apply, submits CTT, where (for example) an existing employee is required to apply for enhanced clearance for a new role and the refusal of such clearance itself leads to removal of their existing clearance.

54. CTT also accepts that the position of "pure" applicants for employment is different in this context because a person does not have any civil right to take up work in any particular post.

55. Furthermore, CTT submits that a claim to the IPT itself, alleging that a vetting decision either breaches Article 8, or is discriminatory contrary to Article 14 read with Article 8, involves the determination of a civil right. He reminds us that this Tribunal (Mummery LJ, President, and Burton J, Vice-President) held in *Kennedy* (*In the matter of Applications Nos. IPT/01/62 and IPT/01/77*, judgment of 23 January 2003), at para. 85, that Article 6 did apply to claims before it alleging a breach of Convention rights such as Article 8. We note that this has not been the subject of authoritative determination in the European Court of Human Rights itself: see e.g. *Kennedy v United Kingdom* (2011) EHRR 4, at para. 179.

56. We endorse what appears to be in essence the common position of the Respondents and CTT: Article 6 does apply to some vetting decisions, depending on their outcome. Where Article 6 applies, the domestic legal framework, including this Tribunal's jurisdiction, is compatible with its requirements. Article 6 does not require disclosure of all material to the person who is refused vetting clearance and indeed it may not require any material to be disclosed, since the overall procedure, including the opportunity to bring a complaint before this Tribunal, is a fair one.

Other rules of procedural fairness

57. The Respondents accept that some additional principles of procedural fairness do apply even to applicants for employment. In particular they have drawn our attention to the decision of the Divisional Court in *R (Kind) v Secretary of State for the Home Department* [2021] EWHC 710 (Admin), in particular at paras. 101-102; 105; 108; 110 and 116 (Jay J, with whose judgment Bean LJ agreed). The Court held that there is no absolute right for the subject of vetting to be told the reasons for the refusal of vetting but noted that:

> "Unless national security considerations preclude the provision of a gist, one should be supplied if considerations of fairness so dictate."

In addition, the Court held that an oral process was not mandatory but that, if a gist were provided, the subject ought to have some opportunity to disabuse the defendant of its concerns.

58. Turning specifically to the giving of reasons, the Respondents accept that, both under Article 6 and under the common law, as many and as detailed reasons for the refusal of clearance should be given as national security allows. That said, where the employment or work is within the milieu of national security it will be lawful to refuse disclosure of reasons because of the national security imperatives. In this context they draw our attention to the Government's Personnel Security Policy, at para. 40:

> "Where a clearance is refused or withdrawn, individuals will be informed, and provided with reasons, where possible. They will also be provided with information about the mechanisms for internal and external appeal. Subject to where equality laws require it, there is no requirement to inform applicants for employment of the reason why they have been refused employment: where the decision is on security grounds, the individual should preferably be told of the reasons, although considerations of national security or confidentiality may prevent this."

59. For his part CTT accepts that there is no general duty to give reasons for an administrative decision but he submits that there are a number of factors in the present context which should lead to the conclusion that reasons should be given as a matter of

fairness whenever a person fails the vetting process, to the extent consistent with interests of national security and confidentiality to third parties. He submits that they should be given whether the person concerned is an existing employee of the security and intelligence agencies; an employee of a third party working for an agency; or an applicant for a position with one of the agencies.

60. Furthermore, CTT submits that one of the most fundamental rules of natural justice is the right for a person to be given an opportunity of stating what his answer to an adverse point is.

61. CTT accepts that in many if not most cases fairness would not require the right to be heard to be extended to applicants who are not employees of one of the agencies and whose current work does not require security clearance. That said, this is a context-sensitive issue, as the decision in *Kind* illustrates. CTT submits that, where there are particular factors such as the apparently aberrant nature of a decision, or there is especially serious damage that refusal of an application might cause, this could require a right to be heard before any final decision is taken. It is not possible to enumerate such factors in the abstract.

62. The Claimant in IPT/19/04/C, Mr E, makes similar submissions to those of CTT but he adds one point which we would mention here. He submits that the practice of some of the "Five Eyes" countries (the UK, the USA, Canada, Australia and New Zealand) is to give more information to individuals in the vetting process. He draws attention to the position in the USA, where Executive Order 12968, issued in 1995, includes the right to be provided "as comprehensive and detailed a written explanation of the basis for that conclusion as the national security interests of the United States and other applicable law permit" and the right to an independent appeal process. He also draws attention to the position in New Zealand, where applicants have a right to respond to any concerns by the New Zealand Security Intelligence Service ("NZSIS"), to see any information they are concerned about and complain to the Inspector-General of Security and Intelligence. Where information is withheld for national security reasons, the NZSIS must still give as much information as possible.

63. In our view, while the position in other countries is of interest, what is central to our consideration is the law in the UK. In any event, we do not understand the relatively brief summary of the position in the USA and New Zealand we have been given to be materially different from that in the UK. The common position is that such information will be disclosed as can be consistent with the interests of national security. Further, there are legal avenues of complaint available, not least to this Tribunal.

64. CTT rightly reminded us of the importance of the right to fairness, particularly when the consequences for a person's livelihood and reputation can be serious. He also emphasised, by reference to authority, that, although there is no general duty to give reasons in administrative law, such a duty may in appropriate circumstances be implied: see *R v Secretary of State for the Home Department, ex p. Doody* [1994] 1 AC 531, at 564 (Lord Mustill). In *Doody*, at 565, Lord Mustill also made the important point that a person may otherwise have virtually no means of ascertaining whether the decision-making process has gone astray; and that reasons may have to be disclosed if there is to be an effective means of detecting the kind of error which would entitle the court to intervene.

65. While we see the force of those general principles, we would observe that, in the present context, they cannot be applied without modification. This is not only because of the context of national security but also because a complaint can be made to this Tribunal without the evidential hurdle that would be imposed in an ordinary claim. This Tribunal is able to investigate a complaint even if the complainant does not have any specific reason to think that the decision-making process has gone astray. Thus, the absence of reasons does not operate as a bar to effective review, unlike in some other contexts.

66. CTT also referred us to the judgment of Elias LJ in *R (Oakley) v South Cambridgeshire District Council* [2017] EWCA Civ 71; [2017] 1 WLR 3765, at paras. 26-30, where Elias LJ acknowledged that it is firmly established that there is no general obligation to give reasons at common law but that, as he said at para. 30:

> "it may be more accurate to say that the common law is moving to the position whilst there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for not doing so."

67. This is no doubt correct in principle. But the justification for not giving reasons may, in some contexts, be one which applies to categories of case rather than to individual cases. In all cases the justification must be established by evidence. In the present case we have concluded that it is so established. Our reasons are set out in our CLOSED judgment.

68. CTT also reminded us of what was said about the requirements of fairness by the Court of Appeal in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647, in particular at para. 60. As the Court observed there, the ability to make representations only after a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness, unless the circumstances of a particular case make this impracticable. That said, everything depends on the context. In the present context, we are satisfied that the imposition of a general duty to give reasons for refusal of clearance to new applicants would harm the interests of national security. This is for the reasons set out in our CLOSED judgment.

69. We note that, in *R (Kind) v Secretary of State for the Home Department* [2021] EWHC 710 (Admin), the Divisional Court found that there had been procedural unfairness where an applicant for a post with the Investigatory Powers Commissioner's Office was refused appointment on the basis of an assessment by the Security Service. In giving the main judgment, Jay J (with whom Bean LJ agreed) said, at para. 116, that the gist of the concerns ought to have been provided to the applicant so that he could provide a more focused response. But we note that that was in the context of an application for a post which was not (directly or indirectly) with the intelligence services themselves. In any event, that decision is not authority for the proposition that there is a general duty to give reasons or that there is a right to make representations in cases of refusal of clearance to a new applicant.

Anonymity

70. We have considered whether, in this public judgment, we should record the names of the parties whose cases we have considered. Our current view is that we should not. It is important that we explain why.

71. Open justice is a foundational common law principle. The statutory provisions establishing this Tribunal (sections 68 and 69 of RIPA) and the rules made under them (the Investigatory Powers Tribunal Rules 2018 (SI 2018/1334) ("the Rules")) contain derogations from this principle, in furtherance of other important public interests. The principle of legality, however, requires that the derogations be stated expressly (or be evident by necessary implication) and strictly construed: see e.g. *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115, at 131 (Lord Hoffmann).

72. In its first public decision, on 23 January 2003 (*Kennedy*, to which we have referred above), this Tribunal held that a blanket rule requiring the Tribunal to sit in private, even when deciding preliminary issues of law, was *ultra vires* and that the Tribunal had a discretion under section 68(1) of RIPA to hold hearings in public and to publish detailed reasons for its rulings on pure questions of law: IPT/01/62 and IPT/01/77, paras. 173 and 195. Since then, the Tribunal has given a large number of open rulings.

73. In *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38; [2020] AC 629, Lady Hale PSC emphasised, at para. 41, that the principle of open justice applies to all courts and tribunals exercising the judicial power of the state and that the purposes served by the principle went beyond enabling public scrutiny of the way in which courts decide cases and extended to enabling the public to understand how the justice system works and why decisions are taken: paras. 42-43. This means that, ordinarily, courts and tribunals have power to allow members of the public to access material held in court records, if they can show a legitimate interest in doing so which advances the open justice principle and subject to a balancing by the court of that interest against any countervailing interests (such as national security, the protection of the interests of children or mentally disabled adults, the protection of privacy more generally and the protection of trade secrets and commercial confidentiality): paras. 45-46.

74. In 2010, Lord Rodger famously drew attention to the importance of permitting publication of litigants' names as an incident of the principle of open justice: *In Re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697, para. 63. Accordingly, in most court proceedings, the ordinary rule is that the litigant's name will be made public unless the litigant provides a cogent reason for anonymity sufficient to outweigh the interest in open justice. Cogent reasons include those identified by Lady Hale in *Dring*.

75. The procedures of this Tribunal, however, differ from those applicable in other court and tribunal proceedings. In the first place, non-parties have no general right of access to any documents filed by parties with the Tribunal. Indeed, there are procedural rules going in the opposite direction.

76. The legislative context in which this Tribunal has to operate is very different from that which governs ordinary civil proceedings. In *Dring*, at paras. 16-33, Lady Hale referred in detail to the provisions of the Civil Procedure Rules which either confer a right on third parties to obtain access to certain documents which have been filed with the court,

or at least confers a wide discretion on the court to afford such access. In contrast, this Tribunal is subject to a very different legal regime, in particular by rule 7 of the Rules. For example, rule 7(11) provides that, subject to para. (12), the Tribunal may *not*, without the consent of the complainant, disclose to any person other than Counsel to the Tribunal –

> "(a) any information or document disclosed or provided to the Tribunal by or on behalf of the complainant or the fact that any such information or document has been disclosed or provided; …"

77. It may be that, in an appropriate case, the Tribunal could grant access to certain information or documents to a non-party on application, exercising its general power under section 68(1) of RIPA to determine its own procedure in accordance with the principles enunciated in *Dring* and subject always to the overriding duty to secure that information is not disclosed to an extent or in a manner that is contrary to the public interest (see rule 7(1) of the Rules). In the ordinary course, however, the names of those who have complained to the Tribunal would not be made public.

78. Moreover, in most courts and tribunals, unless the proceedings are withdrawn or settled, there will at some point be a public hearing followed by a public judgment or decision. In this Tribunal, many complaints and claims (in fact the vast majority) are determined without any public hearing. Rule 15 of the Rules imposes duties and confers powers to provide determinations, or summaries, together with reasons in certain cases. But the Tribunal does not publish every such determination. Most of the judgments and decisions published are rulings on preliminary issues of law decided after OPEN hearings or after considering OPEN submissions.

79. Therefore, a person considering bringing a complaint or filing a claim in the Tribunal would not necessarily expect their identity to become public as a matter of course. The reasonable expectation of litigants seems to us to be an important consideration, though not determinative.

80. In the present case, we do not think it right to determine the issue of anonymity on the basis of generic considerations alone. We have therefore undertaken a balancing exercise of the kind the Supreme Court in *Dring* considered might be required if an application for disclosure of particular information were made. In this case, we consider that there are three particular features which tell in favour of anonymity.

81. First, the decision we now give does not determine any complaint. It deals with generic issues of law. In order to determine those issues, we selected four specimen cases from among those currently before the Tribunal. The cases were selected to ensure that the Tribunal had before it an appropriate range of factual scenarios. Other cases could easily have been selected. This means that the inclusion of the facts of a particular case in this preliminary judgment is, from the perspective of the individual complainant, a matter of happenstance.

82. Secondly, our preliminary judgment concerns vetting, a topic which raises particular sensitivities. Some of the individuals whose cases we have considered have held security clearances for some time. To reveal publicly that an individual has held security clearance could expose that individual to approaches from malign actors,

thereby prejudicing national security and/or the efficient discharge by the intelligence services of their functions.

83. Thirdly, and more generally, to reveal that a particular individual has been refused security clearance is capable of causing real reputational damage. Whilst such damage would not ordinarily be sufficient to outweigh the public interest in open justice, the position is different in the current context. As we have explained above, the ability to complain to this Tribunal forms an important part of the system for scrutinising vetting decisions and, thus, for maintaining the integrity of the vetting process. There is a strong public interest in ensuring that those subject to negative decisions are not disincentivised from accessing the Tribunal by the fear that their identities might become public.

84. For these reasons, we consider that, in the present context, the public interests in favour of anonymity outweigh the public interest in favour of open justice and we accordingly direct that the complainants should be anonymised in any public version of our judgment.

85. We have set out above what is our current view but we did not hear detailed argument about it at the hearing before us. After this judgment has been published, we will consider any representations that may be made on the issue of anonymity by representatives of the media, for example the Press Association.

Conclusion

86. We have set out in this judgment (read with the CLOSED judgment) the correct approach to be taken by this Tribunal on the three generic issues set out above. The Tribunal will apply that approach to the resolution of individual vetting cases before it.

87. By section 67A(2) of RIPA, before making a determination or decision which might be the subject of an appeal under that section, the Tribunal must specify the court which is to have jurisdiction to hear the appeal (the "relevant appellate court"). Subsection (l) makes it clear that an appeal on a point of law lies only against any "determination" of the Tribunal of the kind mentioned in section 68(4) or any "decision" of a kind mentioned in section 68(4C). Subsection 68(4) applies where the Tribunal determine any proceedings, complaint or reference brought before them. There has been no such determination in any individual case before this Tribunal in this judgment. Subsection (4C) deals with the situation where the Tribunal make any decision which (a) is a "final decision of a preliminary issue" in relation to any proceedings, complaint or reference brought before or made to them and (b) is neither a determination of a kind mentioned in subsection (4) nor a decision relating to a procedural matter. For the avoidance of doubt, we make it clear that the judgment we have given on these generic issues is not a final decision of a preliminary issue in relation to any individual proceedings or complaint brought before this Tribunal.

88. Accordingly, if in the future anyone should wish to appeal against a determination or decision which is otherwise appealable in an individual case, we express the view that they will be entitled, if they wish to do so, to seek permission to appeal against the

determination or decision in that case notwithstanding that the reasoning may (wholly or partly) turn on what has been said in this judgment on generic issues.